APR 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1322

GENE BELCHER,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

WILLIAM J. BAXLEY
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama

Administrative Building
Montgomery, Alabama 36130

COUNSEL FOR RESPONDENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO._____

GENE BELCHER,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

I.

OPINION OF THE COURT BELOW

Gene Belcher v. State, 56 Ala. App. ——, 325 So. 2d 195, 4th Div. 318, March 18, 1975. Rehearing denied April 22, 1975. Certiorari quashed by the Supreme Court of Alabama as being improvidently granted, January 9, 1976, 325 So. 2d 199.

II.

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the opinion

of the Court of Criminal Appeals, dated March 18, 1975. Petitioner applies under the provisions of Title 28, Section 1257, U.S.C.A.

III.

QUESTIONS PRESENTED

1. Should certiorari be granted to review the evidence and discuss facts?

2. Is decision of State Trial Court denying motion for new trial subject to review by this Court?

3. Did Petitioner show he suffered substantial prejudice to his rights by the trial court exercising its discretion to relax procedural rules in setting his case for trial one day prior to original setting?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V.

STATEMENT OF THE CASE

Petitioner was indicted, tried, and convicted of grand larceny and sentenced to three years in the penitentiary. He appealed and the Court of Criminal Appeals affirmed holding evidence was sufficient to sustain conviction; that if there was any irregularity with respect to trial court's moving trial date to a day prior to date set at time of arraign-

BLEED THROUGH

ment, such was waived by defendant's conduct in going to trial without insisting upon the irregularity; that defendant could not complain for the first time on appeal of possible prejudice caused by holding bench conferences outside hearing of defendant and court reporter; and that the State established that no injury resulted from the separation of the jury during trial without defendant's consent.

VI.

SUMMARY OF ARGUMENT

Certiorari is not granted to review evidence and discuss specific facts.

Decision of State trial court denying motion for new trial, said decision resting within the sound discretion of the court is not reviewable by this Court.

It is always within the discretion of the trial court to relax or modify its procedural rules when in a given case the ends of justice require it. Such action is subject to review only upon a showing of substantial prejudice to the complaining party.

VII.

ARGUMENT

Most of the allegations of petitioner have to do with sufficiency of the evidence and type of evidence presented.

This Honorable Court in the case of *United States v. Johnson*, 69 L. Ed 925, in an opinion by Mr. Justice Holmes, held:

"We do not grant a certiorari to review evidence and discuss specific facts."

The Court of Criminal Appeals of Alabama in *Moore v. State*, 52 Ala. App. 179, 290 So. 2d 246 held that the decision on motion for new trial rests largely within the sound discretion of the trial court and in reviewing the decision, the Court of Criminal Appeals will indulge every presumption in favor of correctness thereof.

Petitioner claims this is error.

However, this Honorable Court in *Wolfe v. North Carolina*, 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650, in a similar case, held that under North Carolina law, a motion to set aside a verdict and grant a new trial is addressed to the discretion of the court and its refusal to grant such motion is not reviewable on appeal.

Respondent submits that denial of motion for new trial, like the question of sufficiency of evidence, does not present a federal question for review.

Petitioner argues that there was reversible error committed when the court allowed the jury to separate for lunch.

The rule is set out in *Palmore v. State*, 283 Ala. 501, 218 So. 2d 830 as follows:

"Such separation pending a trial is not necessarily grounds for a new trial but is sufficient to show a prima facie right to it, and the burden is upon the state, after such separation is shown, to prove that the jurors conversed with no one affecting the prisoner's guilty and

BLEED THROUGH

that no other influences were exerted which may have biased their deliberations. . . ."

The State met this burden in the evidence taken at the motion for new trial. Each juror was questioned and *none* had discussed the case with anyone or had anyone discussed it with them during the time the jury was separated. Petitioner seeks to infer that some were not sure but a reading of the record of the motion for new trial (return pages 1 through 45) disproves his allegation.

Both the matter of setting up trial date one day early and the fact that attorneys approached the bench were matters of State procedure. They were not objected to at trial and are deemed waived.

This Honorable Court has consistently held that where State procedural rules, as here, were relaxed or modified by the State Court, such case is not reviewable except upon a showing of substantial prejudice. Such was not shown here.

The general rule above enunciated was set out in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 90 S. Ct. 1288, 25 L. Ed 2d. 547 thusly:

> "It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it; the action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

Respondent submits that no substantial rights of the accused were prejudiced and that no Federal question is pre-

sented for review. Respondent respectfully asks this Honorable Court to examine Appendix A of petition, the opinion of the Court of Criminal Appeals of Alabama. Respondent adopts it into his brief as it covers all points raised by Petitioner.

VIII.

CONCLUSION

For the foregoing reasons, respondent submits that no constitutional rights of petitioner were violated. Therefore the writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

IX.

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5 day of April, 1976, I served a copy of the foregoing brief and argument of respondent in opposition to petition for writ of certiorari upon the the attorney for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

Honorable George E. Trawick
Attorney at Law
P.O. Box 47
Ariton, Alabama 36311

DAVID W. CLARK
Assistant Attorney General
of Alabama

State Administrative Building
Montgomery, Alabama 36130